Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1995

FRANZ C. STANGL,

Petitioner,

vs.

ROBERT B. REICH, Secretary of Labor, United States Department of Labor,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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66 pp

QUESTION PRESENTED FOR REVIEW

Whether section 502(a)(5) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(5), authorizes a cause of action for equitable relief by the Secretary of Labor against a nonfiduciary party in interest who has allegedly engaged in a transaction with an employee benefit plan prohibited by ERISA section 406(a), 29 U.S.C. § 1106(a).

PARTIES TO THE PROCEEDINGS

Franz C. Stangl

Robert B. Reich, Secretary of Labor, United States Department of Labor

David R. Davidson, Jr.

Davidson Lumber Sales, Inc. Employees Retirement Plan

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OPINIONS BELOW

On December 22, 1993, the United States District Court for the District of Utah Central Division issued its Memorandum Decision and Order. The Memorandum Decision and Order was not published but is included as Appendix A. On January 10, 1996, the United States Court of Appeals for the Tenth Circuit issued its opinion, reversing and remanding the decision of the District Court. The opinion of the Tenth Circuit Court of Appeals is reported at 73 F.3d 1027 and is included as Appendix B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS

29 U.S.C. § 1132(a) (ERISA section 502(a)(5)) provides, in relevant part:

> A civil action may be brought . . .
>
> (5) except as otherwise provided in subsection (b) of the section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) enforce any provision of this subchapter . . .

29 U.S.C. § 1106(a) (ERISA section 406(a)) provides, in relevant part:

> Except as provided in section 1108 of this title:
>
> (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect —
>
> (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
>
> (B) lending of money or other extension of credit between the plan and a party in interest;
>
> (C) furnishing of goods, services, or facilities between the plan and a party in interest;
>
> (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or
>
> (E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

STATEMENT OF THE CASE

Franz C. Stangl ("Stangl") was general partner of the Bowling Property Limited Partnership, an entity formed with other investors to develop real property in Sandy, Utah. Stangl and David R. Davidson ("Davidson") were partners in the S & D Limited Partnership ("S & D"). Davidson held a fifty percent limited partnership interest in S & D. Stangl held a forty-eight percent limited partnership interest and a two percent general partnership interest in S & D. In addition to his business association with Stangl, Davidson was trustee of the Davidson Lumber Sales Inc. Employees Retirement Plan (the "Plan"), an employee welfare benefit plan established under section 2(1) of ERISA, 29 U.S.C. § 1002(1).

In 1979, the Plan loaned $200,000 to the Bowling Property Limited Partnership. In consideration for the loan, Stangl executed a promissory note on behalf of the Bowling Property Limited Partnership secured by a trust deed on certain real property in favor of the Plan. Although the promissory note was renewed several times between 1979 and 1985, the Bowling Property Limited Partnership made no payments on the promissory note to the Plan.

In 1985, Davidson and Stangl entered into a series of agreements to terminate and reconcile their business relationships. Under the terms of one agreement, Davidson personally assumed the Bowling Property Limited Partnership's obligation to the Plan under the promissory note. Davidson also caused the Plan to reconvey to the Bowling Property Limited Partnership the trust deed securing the promissory note. One consequence of the agreements between Stangl and Davidson was therefore that a Plan fiduciary personally assumed a promissory note to the Plan and then reconveyed the trust deed securing that promissory note.

In 1990, the Secretary of Labor ("Secretary") filed a civil action against both Davidson and Stangl.[1] The Secretary alleged that Davidson had violated his fiduciary duty to the Plan, and that Stangl was a party in interest under section 2(14) of ERISA, 29 U.S.C. § 1002(14), who participated in a prohibited transaction under ERISA section 406, 29 U.S.C. § 1106. The action against Davidson has been resolved under the terms of a consent decree. The Secretary sought an order of restitution against Stangl requiring him to return to the Plan the alleged unjust enrichment that he received from the alleged prohibited transactions, the imposition of a constructive trust on his interest in the subject real property and an order permanently enjoining him from serving as a fiduciary of any pension plan established under ERISA.

The parties filed motions for summary judgment and the district court ruled in favor of Stangl.[2] Relying primarily on this Court's ruling in *Mertens v. Hewitt Assoc.*, 113 S. Ct. 2063 (1993), and on an analysis of relevant legislative history, the district court held that the Secretary cannot bring an action in equity against a nonfiduciary party in interest for engaging in a prohibited transaction under section 406(a) of ERISA, 29 U.S.C. § 1106(a).

The Secretary appealed to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit Court of Appeals reversed the decision of the district court and remanded the case.

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1. Federal jurisdiction was invoked pursuant to ERISA section 502(e)(1), 29 U.S.C. § 1132(e)(1).

2. Because the district court held that ERISA section 406(a), 29 U.S.C. § 1106(a), does not authorize a cause of action against nonfiduciaries, the district court did not reach the issue of whether Stangl was a party in interest.

REASONS FOR GRANTING THE WRIT

I.

ERISA SECTIONS 502(a)(5) AND 406(a) DO NOT EXPLICITLY AUTHORIZE A CAUSE OF ACTION AGAINST A PARTY IN INTEREST AND A CAUSE OF ACTION MAY NOT BE INFERRED.

ERISA sections 502(a)(5) and 406(a), 29 U.S.C. §§ 1132(a)(5) and 1106(a), do not explicitly authorize a cause of action against a party in interest. Section 502(a) provides that the Secretary may bring a civil action "(A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter." ERISA, § 502(a)(5), 29 U.S.C. § 1132(a)(5). Section 406(a), "a provision of this subchapter" to which section 502 applies, states that a *fiduciary* shall not cause a plan to engage in certain transactions with a party in interest:

> Except as provided in section 1108 of this title:
>
> > (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect —
> >
> > > (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
> >
> > > (B) lending of money or other extension of credit between the plan and a party in interest;

> (C) furnishing of goods, services, or facilities between the plan and a party in interest;
>
> (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or
>
> (E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

ERISA, § 406(a), 29 U.S.C. § 1106(a).

In this case, the Tenth Circuit Court of Appeals concluded that sections 406(a) and 502(a)(5), when read together, authorize the Secretary's lawsuit against Stangl as an action under section 502 "for appropriate equitable relief" to redress a violation of section 406 and to enforce that section's prohibition of transactions with parties in interest. However, there is no explicit prohibition of any action by a party in interest under section 406(a). Section 406(a) only prohibits certain actions of a *fiduciary*. Unable to point to express statutory language, the Tenth Circuit Court of Appeals *inferred* that Congress must have intended that ERISA sections 502(a)(5) and 406(a) authorize a cause of action against a party in interest. This Court's decision is *Mertens*, however, prohibits courts from inferring causes of action not expressly provided for by ERISA.

In *Mertens*, this Court held that the relief sought by the plaintiff was in reality compensatory damages — monetary relief for all losses sustained by the plan as a result of the alleged breaches of fiduciary duties — while § 502(a)(3) provided only for "appropriate equitable relief." 113 S. Ct. at 2087. This Court

expressed dismay, however, at the parties' failure to address the antecedent question of the existence under ERISA of a cause of action against nonfiduciaries. *Id.* at 2067-68. In so doing, this Court expressed doubt that such a cause of action exists under ERISA. This Court stated:

> We note at the outset that it is far from clear that, even if this provision does make money damages available, it makes them available for the actions at issue here. It does not, after all, authorize "appropriate equitable relief" *at large*, but only "appropriate equitable relief" for the purpose of "redress[ing any] violations or . . . enforc[ing] any provisions" of ERISA or an ERISA plan. No one suggests that any term of the Kaiser plan has been violated, nor would any be enforced by the requested judgment. And while ERISA contains various provisions that can be read as imposing obligations upon nonfiduciaries, including actuaries, no provision explicitly requires them to avoid participation (knowing or unknowing) in a fiduciary's breach of fiduciary duty. It is unlikely, moreover, that this was an oversight, since ERISA *does* explicitly impose "knowing participation" liability on cofiduciaries. That limitation appears all the more deliberate in light of the fact that "knowing participation" liability on the part of *both* co-trustees *and* third persons was well established under the common law of trusts.

Id. at 2067 (citation omitted).

Referring to a previous decision, this Court continued:

> In [*Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985)], we emphasized our unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides "strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." 473 U.S. at 146-47. All of this notwithstanding, petitioners and their *amicus* the United States seem to assume that respondent's alleged action (or inaction) violated ERISA, and address their arguments almost exclusively to what forms of relief are available. . . . Thus, although we acknowledge the oddity of resolving a dispute over remedies where it is unclear that a remediable wrong has been alleged, we decide this case on the narrow battlefield the parties have chosen and reserve decision of that antecedent question.

Id. at 2067-68 (emphasis in original) (footnotes omitted). This Court elaborated on its reasoning when responding to the dissenting opinion's suggestion that ERISA provides a cause of action against nonfiduciaries for knowing participation in a fiduciary's breach of fiduciary duty. According to this Court, the important question is not whether ERISA expressly bars a civil suit against a nonfiduciary, but whether ERISA affirmatively authorizes such a suit. The Court stated:

> The dissent expresses its certitude that "the statute clearly does not bar such a suit."

> . . . . That, of course, is not the issue. The issue is whether the statute affirmatively *authorizes* such a suit.

Id. at 2068 n.5 (emphasis in original).

Because ERISA contains a carefully crafted and detailed enforcement scheme, this Court should be loath to infer a cause of action not expressly provided for within that scheme. In *Russell*, this Court similarly held that it would not infer causes of action under ERISA which were not authorized by express statutory language.

> The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted, however, provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly. The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a "comprehensive and reticulated statute." . . .
>
> * * *
>
> We are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA. As we stated in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979): "[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."

Russell, 473 U.S. at 146-47 (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980)) (emphasis in original).

In its opinion, the Tenth Circuit Court of Appeals referred to three cases to support its rationale that a cause of action may be inferred. *Nieto v. Ecker*, 845 F.3d 868 (9th Cir. 1988); *Reich v. Compton*, 57 F.3d 270 (3d Cir. 1995); and *Reich v. Rowe*, 20 F.3d 25 (1st Cir. 1994). The Ninth and Third Circuits have concluded that a cause of action may be inferred because "[c]ourts may find it difficult or impossible to undo such illegal transactions unless they have jurisdiction over all parties who allegedly participated in them." *Nieto*, 845 F.2d at 874. The First Circuit concludes that its is irrelevant that section 406 imposes no duty on a party in interest for the reason that section 502(a)(5) reaches "acts or practices" that violate section 406(a). "Although fiduciary breaches also violate ERISA, nonfiduciaries cannot, by definition, engage in the act or practice of breaching a fiduciary duty. Nonfiduciaries, can, however, engage in the act or practice of transacting with an ERISA plan." *Rowe*, 20 F.3d at 31 n.7.

When read in the context of *Mertens* and the legislative history discussed below, these cases do not, however, support the proposition that a cause of action may be inferred. Rather, section 406(a) defines those transactions that are so fraught with conflicts of interest that a breach of fiduciary duty on the part of the fiduciary may be presumed. Section 406 does not affirmatively impose duties on a party in interest for civil liability purposes.

The language of ERISA sections 502(a)(5) and 406(a) does not expressly authorize a cause of action against a party in interest. No cause of action may be inferred.

II.

THE LEGISLATIVE HISTORY OF ERISA SECTION 406(a) CLEARLY ESTABLISHES THAT CONGRESS CONSIDERED AND REJECTED AUTHORIZATION OF A CAUSE OF ACTION AGAINST A PARTY IN INTEREST.

Examination of the legislative history of section 406(a) reveals that the focus of that section is on the fiduciary, not on the party in interest. As stated above, the language of section 406(a) is directed toward plan fiduciaries, providing that "[a]*fiduciary* with respect to a plan shall not. . . ." 29 U.S.C. § 1106(a) (emphasis added). This reading is confirmed by the legislative history of that section, which establishes that Congress considered, and *rejected*, a cause of action against parties in interest who engaged in prohibited transactions. The Senate version of ERISA explicitly provided for liability against parties in interest who engage in transactions prohibited by the Act.[3] 120 Cong. Rec. 4997-98 (1974). In addition, the Senate version imposed an excise tax on any party in interest who engaged in such a prohibited transaction. *Id.* at 4998.

In contrast, the House version provided for only fiduciary liability.[4] H.R. Rep. No. 1280, 93rd Cong., 2d Sess. (1974)

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3. The Senate version provided:

> (i) Any party in interest who participates in a transaction prohibited by this Act knowingly, or with reason to know that the transaction was a transaction to which this Act applies, shall be personally liable to make good to the fund any losses sustained by the fund resulting from such transaction, and to pay to the fund any profits realized by him from such transaction.

120 Cong. Rec. 4997-98 (1974).

4. The conference committee report notes the difference between the Senate and the House versions of ERISA as follows:

(Cont'd)

reprinted in 1974 U.S.C.C.A.N. 5038, 5075 [hereinafter Conference Report]. The Senate approach was rejected in favor of provisions imposing civil liability on fiduciaries for breach of fiduciary duties and imposing civil penalties and an excise tax on parties in interest who engage in prohibited transactions.[5] The Conference Report explains:

(Cont'd)

> Under the House bill, fiduciaries generally are prohibited from dealing on behalf of a plan with persons known to be parties-in-interest unless the dealings are for adequate consideration. Also, the bill generally prohibits fiduciaries from dealing with plan assets for their own accounts, receiving consideration from other parties dealing with the plan in a transaction involving the plan, or acting in a transaction involving the plan on behalf of a person who is adverse to the plan.
>
> Under the House bill, a *fiduciary* is to be personally liable for losses to the plan resulting from violations of the fiduciary responsibility rules.
>
> The Senate amendment includes rules governing fiduciary responsibility in both the labor and tax provisions. The labor provisions of the amendment, as in the case of the House bill, deal with the basic responsibility of fiduciaries, plan administrators, and structure; also and [sic] these provisions would establish certain transactions as prohibited transactions. Fiduciaries (*and parties-in-interest*) are to be *personally liable* under the labor provisions for losses sustained by a plan that result from a violation of these rules. . . .

H.R. Rep. No. 1280, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5075 (emphasis added).

5. Section 409 of the final version of ERISA imposes liability on (Cont'd)

The conference substitute establishes rules governing the conduct of plan fiduciaries under the labor laws (title I) and also establishes rules governing the conduct of disqualified persons (who are generally the same people as "parties in interest" under the labor provisions) with respect to the plan under the tax laws (title II). This division corresponds to the basic difference in focus of the two departments. The labor law provisions apply rules and remedies similar to those under traditional trust law to govern the conduct of *fiduciaries*. The tax law provisions apply an excise tax on *disqualified persons* who violate the new prohibited transaction rules; this is similar to the approach taken under the present rules against self-dealing that apply to private foundations.

The labor provisions deal with the structure of plan administration, provide general standards of conduct for fiduciaries, and make certain specific transactions "prohibited transactions" which plan *fiduciaries* are not to engage in. The tax provisions include only the prohibited transaction rules and apply *only to*

(Cont'd)
fiduciaries for breach of fiduciary duty, 29 U.S.C. § 1109. Sections 502(a)(6) and 502(i) provide for civil penalties against parties-in-interest who engage in prohibited transactions with a plan that is not qualified under the Internal Revenue Code. *Id.* § 1132(a)(6), (i). Section 2003(a) provides for excise taxes against parties-in-interest who engage in prohibited transactions with a plan that is qualified under the Internal Revenue Code. 62 U.S.C.A. § 4975.

> *disqualified persons, not fiduciaries* (unless the fiduciary is otherwise a disqualified person and the transaction involved him, or the fiduciary benefitted from the transaction). . . .

Id. at 5076 (emphasis added). Under the heading "Prohibited Transactions," the Conference Report further explains:

> *In general*—The conference substitute prohibits plan fiduciaries and parties in interest from engaging in a number of specific transactions. Prohibited transaction rules are included both in the labor and tax provisions of the substitute. Under the labor provisions (title I), the *fiduciary is the main focus of the prohibited transaction rules.* This corresponds to the traditional focus of trust law and of civil enforcement of fiduciary responsibility through the courts. On the other hand, the tax provisions (title II) focus on the disqualified person. This corresponds to the present prohibited transaction provisions relating to private foundations.

Id. at 5087 (emphasis added).

The differing treatment to be accorded fiduciaries and parties in interest is also described in the Conference Report under the heading "Civil Liability," which provides, in relevant part:

> *Fiduciaries.*—Under the labor provisions (but not the tax provisions) of the

> substitute, a fiduciary who breaches the fiduciary requirements of the bill is to be personally liable for any losses to the plan resulting from this breach. Such a fiduciary is also to be liable for restoring to the plan any profits which he has made through the use of the plan asset. In addition, such a fiduciary is to be subject to other appropriate relief (including removal) as ordered by a court. The place and manner of bringing civil actions against a fiduciary is described below.
>
> * * *
>
> *Party-in-interest.*—A party-in-interest who engages in a prohibited transaction with respect to a plan that is not qualified (at the time of the transaction) under the Internal Revenue Code may be subject to a civil penalty of up to 5 percent of the amount involved in the transaction. If the transaction is not corrected after notice from the Secretary of Labor, the penalty may be up to 100 percent of the transaction.

Id. at 5100 (emphasis in original).

The legislative history of ERISA demonstrates that Congress rejected the Senate version of the bill, which imposed civil liability on a party in interest for engaging in prohibited transactions, in favor of a version that imposed civil penalties and excise taxes for such conduct. Under the final version of ERISA, civil liability is reserved for fiduciaries who breach ERISA's fiduciary duty provisions. In light of its language and

legislative history, section 406 is best read as defining those transactions that are so fraught with conflicts of interest that a breach of fiduciary duty on the part of the fiduciary may be presumed, rather than as a provision imposing affirmative obligations on a party in interest for civil liability purposes.

CONCLUSION

ERISA sections 502(a)(5) and 406(a) do not expressly authorize a cause of action against a party in interest. No cause of action may be inferred. The legislative history of these sections clearly establishes that Congress considered and rejected authorization of a cause of action under these sections against a party in interest.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION DATED DECEMBER 22, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. 90-C-716W

Case No. 91-C-870J
(Consolidated Cases)

ROBERT B. REICH, Secretary of Labor, United States Department of Labor,

Plaintiff,

-vs-

DAVIDSON LUMBER SALES, INC., EMPLOYEES RETIREMENT PLAN, and FRANZ C. STANGL,

Defendants,

ROBERT B. REICH, Secretary of Labor, United States Department of Labor,

Plaintiff,

-vs-

DAVIDSON LUMBER SALES, INC., EMPLOYEES RETIREMENT PLAN, and DAVID R. DAVIDSON, JR.

Defendants.

Appendix A

MEMORANDUM DECISION AND ORDER

This matter is before the court on Plaintiff's Revised Motion for Summary Judgment brought by plaintiff Secretary of Labor, United States Department of Labor (the "Secretary"); on Defendants' Joint Motion for Summary Judgment brought by defendants Franz C. Stangl, III ("Stangl") and David R. Davidson, Jr. ("Davidson"); and on the Secretary's cross motion for summary judgment on the ERISA statute of limitations.[1] A hearing on the motions was held on October 27, 1993. At the hearing, the Secretary was represented by Steven R. DeSmith and Stangl was represented by Dean C. Andreason. Before the hearing, the court considered carefully the memoranda and other materials submitted by the parties. At the hearing the court took

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1. In addition to resisting Defendants' Joint Motion for Summary Judgment, the Secretary moves this court to grant him summary judgment that his claims against Stangle are not barred by the statute of limitations. Pl.'s Mem. Opp'n Defs.' Joint Mot. Summ. J. at 19-20.

Also filed with the court is Defendant Stangl's Motion for Partial Summary Judgment. That motion, however, is rendered moot by the Secretary's decision not to pursue the claims that are the subject of that motion; namely, the $150,000.00 loan made in 1977 by the Davidson Lumber Sales Retirement Plan (the "Plan") to Davidson and his wife and the $56,270.00 loan made on November 23, 1979 by the Plan to Davidson. *See id.* at 2. Accordingly, the parties did not argue that motion and the court need not consider its merits.

Similarly, Defendants' Joint Motion for Summary Judgment is rendered moot with regard to those same loans, and is relevant only with regard to the $200,000.00 loan made on December 21, 1979 and renewed on May 31, 1985 by the Plan to Bowling Properties, Ltd. *See id.* Davidson's participation in that motion is negated by virtue of a Final Judgment Against Defendant David R. Davidson entered August 16, 1993.

the matters under advisement. Since that time, the court has further considered the law and the facts relating to the motion. Now being fully advised, the court renders the following Memorandum Decision and Order.

I. BACKGROUND

This case involves an action by the Secretary against Stangl and others for alleged breaches of the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"). The Secretary alleges that Stangl is liable to the plan as a knowing participant in certain prohibited transactions and as a party in interest to those same transactions. Stangl responds that ERISA does not provide for knowing participant or party-in-interest liability for nonfiduciaries. Stangl also contends that the Secretary's claims are barred by ERISA's statute of limitations. The following facts are undisputed.

The Plan was established in 1978 as a pension plan under ERISA. From June 28, 1978 through December 1986, Davidson served as a plan trustee and was responsible for managing and investing assets of the Plan and had the authority to invest, withdraw, loan, or otherwise manage Plan assets.

Prior to the establishment of the Plan, Davidson and Stangl formed the S & D Limited Partnership ("S & D"), in which Davidson held a 50% limited partnership interest, and Stangl held a 48% limited partnership interest and a 2% general partnership interest. Davidson and Stangl retained their respective partnership interests in S & D during the time period relevant to the instant action.

Also prior to the establishment of the Plan, Stangl and

certain third parties formed the Bowling Property Limited Partnership (the "Bowling Property Partnership") to develop certain real property in Sandy, Utah (the "Sandy Property"). Stangl was the sole general partner of the Bowling Property Partnership. Davidson did not hold a partnership interest in the Bowling Property Partnership.

On December 21, 1979, the Plan loaned $200,000.00 to the Bowling Property Partnership (the "Bowling Property Loan"). In consideration of the Bowling Property Loan, Stangl, as general partner of the Bowling Property Partnership, executed a Promissory Note in the amount of $200,000.00 in favor of the Plan (the "Note"). As security for the Note, Stangl executed a Trust Deed on the Sandy Property in favor of the Plan. The Note was renewed several times, the latest renewal occurring on or about May 31, 1985. As of that date, no payments had been made on the Note.

On August 28, 1985, Stangl and Davidson entered into a series of agreements purporting to reconcile numerous accounts between them. Pursuant to one of the agreements, Davidson assumed the Bowling Property Loan, and caused the Plan to reconvey to the Bowling Property Partnership the Trust Deed securing that loan.

On August 30, 1990, the Secretary filed a civil suit seeking redress against Stangl pursuant to ERISA § 502(a)(5), 29 U.S.C.A. § 1132(a)(5) (West 1985).[2] In his Complaint, the

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2. ERISA § 502(a)(5) provides:

A civil action may be brought —

(Cont'd)

Secretary sought both legal and equitable relief against Stangl for Stangl's alleged knowing participation in fiduciary breaches committed by Davidson. Subsequently, the United States Supreme Court ruled in *Mertens v. Hewitt Assocs.*, 113 S. Ct. 2063 (1993), that ERISA does not authorize suits for money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty. *Id.* at 2068-72. Accordingly, the Secretary withdrew his claim against Stangl for money damages. Pl.'s Mem. Supporting Auth. Supp. Pl.'s Revised Mot. Summ. J. at 2-3.

The Secretary now moves this court for summary judgment claiming entitlement to equitable relief to redress Stangl's alleged knowing participation in various violations of ERISA's fiduciary duty provisions in connection with the Bowling Property Loan. Specifically, the Secretary alleges that Davidson is both a fiduciary of the Plan and a party in interest to the Plan, and that Stangl is a party in interest to the Plan.[3] The Secretary

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(Cont'd)

. . . .

> (5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter [.]

29 U.S.C.A. § 1132(a)(5) (West 1985).

3. The parties do not dispute that Davidson was a fiduciary to the Plan as defined by ERISA § (3)(21)(A), 29 U.S.C.A. § 1002(21)(A) (West Supp. 1993).
(Cont'd)

alleges Davidson violated his fiduciary duty to the Plan by

(Cont'd)
The parties do dispute, however, whether Stangl was a party in interest to the Plan. The Secretary argues that Stangl is a party in interest to the Plan pursuant to ERISA § 3(14), 29 U.S.C.A. § 1002(14) (West Supp. 1993), by virtue of his status as sole general partner of the Bowling Property Partnership and his partnership interest in S&D. ERISA § 3(14) provides, in relevant part:

> (14) The term "party in interest" means, as to an employee benefit plan —
>
> > (A) any fiduciary (including, but not limited to an administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;
> >
> > . . .
> >
> > (G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of —
> >
> > . . .
> >
> > > (ii) the capital interest or profits interest of such partnership
>
> is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);
>
> . . .
>
> (I) a 10 percent or more (directly or indirectly in capital or profits) partner or joint venturer of a

(Cont'd)

causing the Plan to transfer Plan assets to Stangl, a party in interest to the Plan, through the Bowling Property Loan.[4] The Secretary also contends that Davidson's subsequent assumption of the Bowling Property Loan pursuant to the August 28, 1985 Agreement constituted a loan to Davidson, himself a party in

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(Cont'd)

> person described in subparagraph (B), (C), (D), (E), or (G).

29 U.S.C.A. § 1002(14) (West Supp. 1993). Under that section, S&D is a party in interest by virtue of Davidson's 50% profits interest. Therefore, the Secretary argues, because Stangl is a "10 percent or more" partner in S&D, he is a party in interest under § 3(14). The court need not decide whether Stangl is a party in interest, however, because of its holding, below, that ERISA § 502(a)(5) does not provide a cause of action against nonfiduciaries.

4. ERISA § 406(a)(1)(D) provides:

> (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect —
>
> . . .
>
> (D) transfer to, or use by or for the benefit of, a party in interest, or any assets of the plan[.]

29 U.S.C.A. § 1106(a)(1)(D) (West 1985). The Secretary points out that Stangl is the sole general partner of the Bowling Property Partnership. The Secretary then argues that Stangl used the proceeds of the Bowling Property Loan for his personal use, and not that of the partnership, thus constituting a "direct transfer to, or use by, or for the benefit of a party in interest of [the] assets of the [P]lan," a prohibited transaction under ERISA § 406(a)(1)(D).

interest, which is a prohibited transaction under ERISA.[5] Finally, the Secretary contends that Davidson's release of the Bowling Property Partnership from responsibility on the Bowling Property Loan was given in exchange for Stangl's retirement of Davidson's partnership debts, which constituted a prohibited transaction between the Plan and a fiduciary.[6]

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5. ERISA § 406(a)(1)(B) provides:

> (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect —
>
> . . .
>
> (B) lending of money or other extension of credit between the plan and a party in interest[.]

29 U.S.C.A. § 1106(a)(1)(B) (West 1985).

6. ERISA § 406(b)(1)-(3) provides:

> A fiduciary with respect to a plan shall not —
>
> (1) deal with the assets of the plan in his own interest or for his own account,
>
> (2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(Cont'd)

The Secretary alleges Stangl knowingly participated in Davidson's alleged breaches of fiduciary duty. Although the Secretary acknowledges that *Mertens* forecloses the possibility of legal relief against nonfiduciaries for knowing participation in a fiduciary's breach of fiduciary duties, *Mertens*, 113 S.Ct. at 2068-72, the Secretary argues that *Mertens* allows equitable relief against Stangl. Specifically, the Secretary requests an order of restitution to the Plan of the unjust enrichment that Stangl realized from the alleged prohibited transactions, the imposition of a constructive trust on Stangl's interest in the Sandy Property, and an order permanently enjoining Stangl from any future participation in violations of the fiduciary provisions of ERISA and from service as a fiduciary to any ERISA defined pension plan.

In addition to his argument that Stangl is liable under § 502(a)(5) for knowing participation in Davidson's alleged breaches of fiduciary duty, the Secretary argues in his revised motion for summary judgment that Stangl is also liable under § 502(a)(5) as a result of his status as a party in interest. The Secretary argues that each of the above transactions constituted a prohibited transaction between the Plan and Stangl as a party in interest. As noted above, the Secretary contends the Bowling Property Loan, and its subsequent renewals, were transfers or uses of Plan assets and a lending of money to Stangl as a party in

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(Cont'd)

> (3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

29 U.S.C.A. § 1106(b)(1)-(3) (West 1985).

interest.[7] Similarly, the Secretary contends that the Plan's release of the Bowling Property Partnership from the Bowling Property Loan, and the corresponding release of the deed of trust on the Sandy Property, also constituted a transfer of Plan assets to Stangl.[8]

Stangl opposes the Secretary's motion, arguing that *Mertens* strongly suggests that ERISA does not provide a cause of action against nonfiduciaries and, therefore, any claim for relief against a nonfiduciary, whether equitable or otherwise, is not viable. In addition, Stangl moves for summary judgment that the Secretary's action is barred by ERISA's statute of limitations.[9] This court agrees that § 502(a)(5) does not provide a cause of action against nonfiduciaries for knowing participation in a fiduciary's breach of fiduciary duties or against nonfiduciary parties-in-interest for engaging in prohibited transactions. As a result of this ruling, the court need not address the parties' cross motions for summary judgment based on the statute of limitations.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

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7. *See* 29 U.S.C.A. § 1106(a)(1)(B), (D) (West 1985).

8. *See* 29 U.S.C.A. § 1106(a)(1)(D) (West 1985).

9. The Secretary opposes this motion and similarly moves for summary judgment that its action is not barred by the statute of limitations. Pl.'s Mem. Opp'n Defs.' Joint Mot. Summ. J. at 19-20.

material fact, and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In applying this standard, the court must construe all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Wright v. Southwestern Bell Tel. Co.*, 925 F.2d 1288, 1292 (10th Cir. 1991).

Once the moving party has carried its burden, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by . . . affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quoting Rule 56(e)); *Gonzales v. Millers Casualty Ins. Co.*, 923 F.2d 1417, 1419 (10th Cir. 1991).[10] The non-moving party must "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

In considering whether there exists a genuine issue of material fact, the court does not weigh the evidence but instead inquires whether a reasonable jury, faced with the evidence presented, could return a verdict for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Clifton v. Craig*, 924 F.2d 182, 183 (10th Cir.), *cert. denied*, 112 S. Ct. 97 (1991).[11] Finally, all material facts asserted by the

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10. The summary judgment motion may be "opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves." *Celotex*, 477 U.S. at 324.

11. "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient." *Anderson*, 477 U.S. at 252.

moving party shall be deemed admitted unless specifically controverted by the opposing party. D. Utah R. 202(b)(4).

III. DISCUSSION

In bringing his action, the Secretary relies on ERISA § 502(a)(5), which provides:

> A civil action may be brought —
>
> . . . .
>
> (5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter[.]

29 U.S.C.A. § 1132(a)(5) (West 1985). Under that section, the Secretary seeks "appropriate equitable relief . . . to redress" certain ERISA violations allegedly committed by Davidson and Stangl. The Secretary contends relief against Stangl is justified on two grounds. First, the Secretary alleges Stangl was a knowing participant in Davidson's various violations of ERISA's fiduciary duty provisions. The Secretary argues that the "broad remedial language" of ERISA makes appropriate redress against those who knowingly participate in a fiduciary's breach of fiduciary duty. Pl.'s Mem. Supporting Auth. Supp. Pl.'s Revised Mot. Summ. J. at 16. Specifically, the Secretary argues that the scope of the term "appropriate equitable relief" must be

determined by reference to the common law of trusts. The Secretary then points out that at common law, a non-fiduciary is accountable for losses resulting from knowing participation in a breach of fiduciary duty. Therefore, the Secretary argues, § 502(a)(5) should be read to give the Secretary a cause of action for equitable relief against nonfiduciaries for such knowing participation.

Second, the Secretary alleges Stangl violated ERISA's proscriptions against transactions between an ERISA plan and a party in interest. Again, the Secretary relies on § 502(a)(5)'s language permitting the Secretary to seek appropriate equitable relief to redress violations of Title I of ERISA. That language, the Secretary argues, should be read to grant the Secretary a cause of action for equitable relief against nonfiduciary parties-in-interest who engage in prohibited transactions with an ERISA plan.

The court disagrees with the Secretary's contentions. Although the *Mertens* Court did not rule on whether ERISA provides a cause of action against nonfiduciaries for knowing participation in a fiduciary's breach of fiduciary duty, it strongly suggested that no such cause of action is available. *Blevins Screw Prods., Inc. v. Prudential Bache Securities. Inc.*, No. 93-CV-40050-FL, 835 F. Supp. 984, 1993 WL 436997, at *2 (E.D. Mich. 1993). *But see Harris Trust & Savs. Bank v. Salomon Bros., Inc.*, 832 F. Supp. 1169, 1173 (N.D. Ill. 1993); *Airparts Co. v. Custom Benefit Servs. of Austin, Inc.*, 828 F. Supp. 870, 875-76 (D. Kan. 1993). Furthermore, with regard to a cause of action against nonfiduciary parties-in-interest who engage in prohibited transactions with an ERISA plan, the legislative history of ERISA suggests that Congress did not intend to provide such a cause of action.

Appendix A

In *Mertens*, a class of former employees who participated in the Kaiser Steel Retirement Plan, a qualified ERISA pension plan, brought a civil action under ERISA § 502(a)(3), against the plan's actuary for, *inter alia*, knowing participation in a plan fiduciary's breach of fiduciary duties.[12] 113 S. Ct. at 2065-66. The United States District Court for the District of California dismissed the complaint and the United States Court of Appeals for the Ninth Circuit affirmed in relevant part. *Id.* at 2066. The Supreme Court granted certiorari.

The *Mertens* Court affirmed on the grounds that the relief sought by the plaintiffs was in reality nothing other than compensatory damages — monetary relief for all losses sustained by their plan as a result of the alleged breaches of fiduciary duties — while § 502(a)(3) provided only for "appropriate equitable relief." *Id.* at 2068. The Court expressed dismay, however, at the parties' failure to address the antecedent question of the existence under ERISA of a cause of action against nonfiduciaries. *Id.* at 2967-68. In so doing, the Court expressed doubt that such a cause of action exists under ERISA. The Court stated:

> We note at the outset that it is far from

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12. Section 502(a)(3) provides, in language similar to that of § 502(a)(5), for a civil action by a participant, beneficiary, or fiduciary:

> (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

Id. § 1132(a)(3) (West 1985).

clear that, even if this provision does make money damages available, it makes them available for the actions at issue here. It does not, after all, authorize "appropriate equitable relief" *at large*, but only "appropriate equitable relief" for the purpose of redress[ing any] violations or . . . enforc[ing] any provisions of ERISA or an ERISA plan. No one suggests that any term of the Kaiser plan has been violated, nor would any be enforced by the requested judgment. And while ERISA contains various provisions that can be read as imposing obligations upon nonfiduciaries, including actuaries, no provision explicitly requires them to avoid participation (knowing or unknowing) in a fiduciary's breach of fiduciary duty. It is unlikely, moreover, that this was an oversight, since ERISA *does* explicitly impose "knowing participation" liability on cofiduciaries. . . . That limitation appears all the more deliberate in light of the fact that "knowing participation" liability on the part of *both* cotrustees *and* third persons was well established under the common law of trusts. . . . In [*Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985),] we emphasized our unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides "strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot

> to incorporate expressly." 473 U.S. at 146-47. All of this notwithstanding, petitioners and their *amicus* the United States seem to assume that respondent's alleged action (or inaction) violated ERISA, and address their arguments almost exclusively to what forms of relief are available. . . . Thus, although we acknowledge the oddity of resolving a dispute over remedies where it is unclear that a remedial wrong has been alleged, we decide this case on the narrow battlefield the parties have chosen and reserve decision of that antecedent question.

Id. (emphasis in original) (footnotes omitted). The Court elaborated on its reasoning when responding to the suggestion, made by the dissenting opinion, that ERISA provides a cause of action against nonfiduciaries for knowing participation in a fiduciary's breach of fiduciary duty. According to the Court, the important question is not whether ERISA expressly bars a civil suit against a nonfiduciary, but whether ERISA affirmatively authorizes such a suit. The Court stated:

> The dissent expresses its certitude that "the statute clearly does not bar such a suit." . . . . That, of course, is not the issue. The issue is whether the statute affirmatively *authorizes* such a suit. To meet that requirement, it is not enough to observe that "trust beneficiaries clearly had such a remedy [against nonfiduciaries who actively assist in the fiduciary's breach] at common law." . . . . They had such a *remedy* because

> nonfiduciaries had a *duty* to the beneficiaries not to assist in the fiduciary's breach. A similar duty is set forth in ERISA; but as we have noted, only *some* common-law "nonfiduciaries" are made subject to it, namely, those who fall within ERISA's artificial definition of "fiduciary."

Id. at 2068 n.5 (emphasis in original). Although the *Mertens* Court did not render a holding on whether ERISA provides a cause of action against nonfiduciaries for knowing participation in a fiduciary's breach of fiduciary duties, The Court's reasoning strongly suggests that ERISA does not so provide.

Because ERISA contains a carefully crafted and detailed enforcement scheme, this court is reluctant to infer a cause of action not expressly provided within that scheme. Although ERISA explicitly provides a cause of action against fiduciaries for breach of fiduciary duty, it is silent with regard to causes of action against nonfiduciaries for participation in such a breach. Moreover, the fact that Congress explicitly provided for causes of action against cofiduciaries based on "knowing participation" minimizes any claim that Congress intended such liability to attach to nonfiduciaries despite ERISA's silence on the matter.

Mertens is less clear with regard to a cause of action against nonfiduciary parties-in-interest for engaging in prohibited transactions under ERISA § 406(a), 29 U.S.C.A. § 1106(a) (West 1985). In opining that ERISA did not provide a cause of action based on knowing participation against nonfiduciaries, the *Mertens* Court relied, in part, on the fact that "no provision [within ERISA] explicitly requires [nonfiduciaries] to avoid participation (knowing or unknowing) in a fiduciary's breach of

fiduciary duty." *Id.* at 2067. The Court distinguished Mertens from other situations in which it suggested that various other provisions "can be read as imposing obligations upon nonfiduciaries . . . ." *Mertens*, 113 S. Ct. at 2067 n.4. The Court then cited to ERISA § 406(a), which defines dealings between a plan and a party in interest as a prohibited transaction, as such a provision.[13] *Id.*

Examination of § 406 and its legislative history reveals, however, that the focus of that section is on the fiduciary, and not on the party in interest. The language of § 406(a) is directed toward plan fiduciaries, providing that "[a] *fiduciary* with respect to a plan shall not . . . ." 29 U.S.C.A. § 1106(a) (West 1985) (emphasis added). This reading is confirmed by the legislative history of that section, which shows that Congress considered, and *rejected*, a cause of action against nonfiduciary parties-in-interest who engaged in prohibited transactions. The Senate version of ERISA explicitly provided for liability for parties-in-interest who engage in transactions prohibited by the

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13. The court referred to actuaries as a possible type of nonfiduciary that may be subject to obligations under ERISA, stating in a footnote:

> For example, a person who provides services to a plan is a "party in interest," 29 U.S.C. § 1002(14)(B), and may not offer his services or engage in certain other transactions with the plan, § 1106(a), for more than reasonable compensation, § 1108(b)(2). See also § 1023(d)(8) (annual reports must include certification by enrolled actuary); § 1082(c)(3) (minimum funding standards for plan to be based on "reasonable" actuarial assumptions).

Id.

Appendix A

Act.[14] 120 Cong. Rec. 4997-98 (1974). In addition, the Senate version imposed an excise tax on any party in interest who engaged in such a prohibited transaction. *Id.* at 4998. In contrast, the House version provided for only fiduciary liability.[15] H.R.

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14. The Senate version provided:

> (i) Any party in interest who participates in a transaction prohibited by this Act knowingly, or with reason to know that the transaction was a transaction to which this Act applies, shall be personally liable to make good to the fund any losses sustained by the fund resulting from such transaction, and to pay to the fund any profits realized by him from such transaction.

120 Cong. Rec. 4997-98 (1974).

15. The conference committee report notes the difference between the Senate and the House versions of ERISA as follows:

> Under the House bill, fiduciaries generally are prohibited from dealing on behalf of a plan with persons known to be parties-in-interest unless the dealings are for adequate consideration. Also, the bill generally prohibits fiduciaries from dealing with plan asset for their own accounts receiving consideration from other parties dealing with the plan in a transaction involving the plan, or acting in a transaction involving the plan on behalf of a person who is adverse to the plan.
>
> Under the House bill, a *fiduciary* is to be personally liable for losses to the plan resulting from violations of the fiduciary responsibility rules.

(Cont'd)

Appendix A

Rep. No. 1280, 93rd Cong., 2d Sess. *reprinted in* 1974 U.S.C.C.A.N. 5038, 5075 [hereinafter Conference Report]. The Senate approach was rejected, however, in favor of provisions imposing civil liability on fiduciaries for breach of fiduciary duties and imposing civil penalties and an excise tax on parties-in-interest who engage in prohibited transactions.[16] The Conference Report explains:

> The conference substitute establishes rules governing the conduct of plan

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(Cont'd)

> The Senate amendment includes rules governing fiduciary responsibility in both the labor and tax provisions. The labor provision of the amendment, as in the case of the House bill, deal with the basic responsibility of fiduciaries, plan administrators, and structure; also and [sic] these provisions would establish certain transactions as prohibited transactions. Fiduciaries (*and parties-in-interest*) are to be *personally liable* under the labor provisions for losses sustained by a plan that result from a violation of these rules. . . .

H.R. Rep. No. 1280, 93rd Cong., 2d Sess. *reprinted in* 1974 U.S.C.C.A.N. 5038, 5075 (emphasis added).

16. Section 409 of the final version of ERISA imposes liability on fiduciaries for breach of fiduciary duty, 29 U.S.C.A. § 1109 (West 1985). Sections 502(a)(6) and 502(i) provide for civil penalties against parties-in-interest who engage in prohibited transactions with a plan that is not qualified under the Internal Revenue Code. *Id.* § 1132(a)(6), (i) (West 1985 & Supp. 1993). Section 2003(a) provides for excise taxes against parties-in-interest who in engage in prohibited transactions with a plan that is qualified under the Internal Revenue Code. 26 U.S.C.A. § 4975 (West Supp. 1993).

> fiduciaries under the labor laws (title I) and also establishes rules governing the conduct of disqualified persons (who are generally the same people as "parties in interest" under the labor provisions) with respect to the plan under the tax laws (title II). This division corresponds to the basic difference in focus of the two departments. The labor law provisions apply rules and remedies similar to those under traditional trust law to govern the conduct of *fiduciaries*. The tax law provisions apply an excise tax on *disqualified persons* who violate the new prohibited transaction rules; this is similar to the approach taken under the present rules against self-dealing that apply to private foundations.
>
> The labor provisions deal with the structure of plan administration, provide general standards of conduct for fiduciaries, and make certain specific transactions "prohibited transactions" which plan *fiduciaries* are not to engage in. The tax provisions include only the prohibited transaction rules and apply *only to disqualified persons, not fiduciaries* (unless the fiduciary is otherwise a disqualified person and the transaction involved him, or the fiduciary benefitted from the transaction). . . .

Id. at 5076 (emphasis added). Under the heading "Prohibited Transactions," the Conference Report further explains:

Appendix A

> *In general* — The conference substitute prohibits plan fiduciaries and parties in interest from engaging in a number of specific transactions. Prohibited transaction rules are included both in the labor and tax provisions of the substitute. Under the labor provisions (title I), *the fiduciary is the main focus of the prohibited transaction rules*. This corresponds to the traditional focus of trust law and of civil enforcement of fiduciary responsibility through the courts. On the other hand, the tax provisions (title II) focus on the disqualified person. This corresponds to the present prohibited transaction provisions relating to private foundations.

Id. at 5087 (emphasis added).

The differing treatment to be accorded fiduciaries and parties-in-interest is further demarcated in the Conference Report under the heading "Civil Liability," which provides, in relevant part:

> *Fiduciaries*. — Under the labor provisions (but not the tax provisions) of the substitute, a fiduciary who breaches the fiduciary requirements of the bill is to be personally liable for any losses to the plan resulting from this breach. Such a fiduciary is also to be liable for restoring to the plan any profits which he has made through the use of any plan asset. In addition, such a fiduciary is

> to be subject to other appropriate relief (including removal) as ordered by a court. The place and manner of bringing civil actions against a fiduciary is described below.
>
> . . .
>
> *Party-in-interest.* — A party-in-interest who engages in a prohibited transaction with respect to a plan that is not qualified (at the time of the transaction) under the Internal Revenue Code may be subject to a civil penalty of up to 5 percent of the amount involved in the transaction. If the transaction is not corrected after notice from the Secretary of Labor, the penalty may be up to 100 percent of the transaction.

Id. at 5100 (emphasis in original).

The legislative history of ERISA demonstrates that Congress rejected the Senate version of ERISA, which imposed civil liability on a party in interest for engaging in prohibited transactions, in favor of a version that imposed civil penalties and excise taxes for such conduct. Under the final version of ERISA, civil liability was reserved for fiduciaries who breach ERISA's fiduciary duty provisions. In light of its language and legislative history, § 406 is best read as defining those transactions that are so fraught with conflicts of interest that a breach of fiduciary duty on the part of the fiduciary may be presumed, rather than as a provision imposing affirmative obligations on a party in interest for civil liability purposes.

Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that:

(1) Plaintiff's Motion for Summary Judgment is denied;

(2) Stangl is granted summary judgment on the Secretary's prayer for equitable relief; and

(3) Stangl's counsel is to prepare an appropriate order in accord with this Memorandum Decision and Order.

Dated this 22 day of December, 1993.

s/ David K. Winder
David K. Winder
United States District Judge

Mailed a copy of the foregoing to the following named counsel this 22nd day of December, 1993.

s/ Lois G. Elder
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Appendix A

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APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED JANUARY 10, 1996

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 94-4096

ROBERT B. REICH, Secretary of Labor, United States Department of Labor,

Plaintiff-Appellant,

v.

FRANZ G. STANGL,

Defendant-Appellee,

DAVIDSON LUMBER SALES, INC., EMPLOYEES RETIREMENT PLAN, and DAVID R. DAVIDSON, JR.,

Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
(D.C. No. 90-C-716W)

Michael Alan Schloss, United States Department of Labor, Washington D.C. (Thomas S. Williamson and Karen L. Handort, United States Department of Labor, Office of the Solicitor, Washington D.C. and Marc I. Machiz, Associate Soliciter, Plan Benefits Security Division, Washington D.C. (with them on the briefs) appearing for Plaintiff-Appellant.

Appendix B

Dean C. Andreasen (Robert E. Mansfield with him on the briefs), Campbell, Maack & Sessions, Salt Lake City, Utah, appearing for Defendant-Appellee.

Before BRORBY, KELLY, and HENRY, Circuit Judges.

HENRY, Circuit Judge.

Plaintiff-appellant, the Secretary of Labor (the Secretary), appeals the district court's summary judgment order dismissing his claims against the defendant-appellee Franz C. Stangl. The Secretary brought this action under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461, alleging that Mr. Stangl was a party in interest who had engaged in prohibited transactions. The Secretary sought restitution of plan assets and other equitable relief. Relying upon legislative history, the district court held that Congress did not intend to create such a cause of action. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and reverse the decision of the district court.

I. BACKGROUND

Mr. Stangl was general partner of the Bowling Property Limited Partnership, an entity formed with other investors to develop real property in Sandy, Utah. Mr. Stangl and David R. Davidson were partners in the S & D Limited Partnership ("S & D"). Mr. Davidson held a fifty percent limited partnership interest in S & D, while Mr. Stangl held a forty-eight percent limited partnership interest and a two percent general partnership interest in S & D. In addition to his business association with Mr. Stangl, Mr. Davidson was trustee of the Davidson Lumber Sales Inc. Employees Retirement Plan (the Plan), an employee welfare benefit plan under section 2(1) of ERISA, 29 U.S.C. § 1002(1).

Appendix B

In 1979, the Plan made a $200,000 loan to the Bowling Property Limited Partnership. In exchange for the loan, Mr. Stangl executed a note on behalf of the Bowling Property Limited Partnership secured by a trust deed on the Sandy, Utah property in favor of the Plan. Although the note was renewed several times between 1979 and 1985, the Bowling Property Partnership made no payments to the Plan.

In 1985, Mr. Davidson and Mr. Stangl entered into a series of agreements purporting to reconcile their business relationship. Under the terms of one agreement, Mr. Davidson personally assumed the Bowling Property Limited Partnership's obligations on the loan from the Plan. Mr. Davidson also caused the Plan to reconvey the trust deed securing that loan back to the Bowling Property Limited Partnership. One consequence of this "reconciliation" was therefore that the Plan fiduciary personally assumed a note to the Plan and then released the mortgage securing that note.

In 1990, the Secretary filed a civil action against Mr. Davidson and Mr. Stangl.[1] The Secretary alleged that Mr. Davidson had violated his fiduciary duty to the Plan, and that Mr. Stangl was a party in interest under section 2(14) of ERISA, 29 U.S.C. § 1002(14), who participated in a prohibited transaction under section 406, 29 U.S.C. § 1106. Although it is not a part of the record in this case, it appears that the allegations against Mr. Davidson have been resolved. As to Mr. Stangl, the Secretary

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1. In his original complaint, the Secretary also sought legal damages. However, he withdrew his legal claim against Mr. Stangl during the course of this litigation when the Supreme Court issued its opinion in *Mertens v. Hewitt Assocs.*, 113 S. Ct. 2063 (1993), holding that ERISA does not authorize legal damages against nonfiduciaries for participating in a fiduciary breach. *Id.* at 2068-72.

sought an order of restitution requiring him to return to the Plan the unjust enrichment that he received from the allegedly prohibited transactions, the imposition of a constructive trust on his interest in the Sandy property, and an order permanently enjoining him from serving as a fiduciary in any ERISA pension plan.

The parties filed motions for summary judgment, and the district court ruled in favor of Mr. Stangl.[2] Relying primarily on legislative history, the court held that the Secretary cannot bring an action in equity against a nonfiduciary party in interest for engaging in a prohibited transaction under section 406(a) of ERISA, 29 U.S.C. § 1106(a).

On appeal, the Secretary challenges this conclusion. We engage in de novo review of the district court's grant of summary judgment. *Boone v. Carlsbad Bancorporation, Inc.*, 972 F.2d 1545, 1550 (10th Cir. 1992).

II. DISCUSSION

ERISA is a comprehensive statute designed to protect employee benefit plans. *See* ERISA, § 1, 29 U.S.C. § 1001 (noting that employee benefit plans have treated beneficiaries unfairly and that Congress intends to establish standards to provide equitable retirement plans). In furtherance of that policy, ERISA designates as fiduciaries not only those persons expressly named by a plan, *see* ERISA, § 402(a), 29 U.S.C. § 1102(a), but also those persons who exercise control over the

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2. Because the district court held that ERISA does not provide a cause of action against nonfiduciaries, the district court did not reach the issue of whether Mr. Stangl was a party in interest.

management and administration of the plan and the distribution of its assets, *see* ERISA, § 2(21)(A), 29 U.S.C. § 1002(21)(A). Individuals who provide "investment advice for a fee or other compensation" are also regarded as fiduciaries. *Id.*

ERISA imposes a number of obligations on fiduciaries, including " 'the proper management, administration, and investment of [plan] assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest.' " *Mertens,* 113 S. Ct. at 2066 (quoting *Massachusetts Mut. Life Ins. Co. v. Russell,* 473 U.S. 134, 142-43 (1985)). The statute provides specific remedies for the violation of these obligations. Under section 409, a fiduciary "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary." ERISA, § 409(a), 29 U.S.C. § 1109 (a).

ERISA also designates certain individuals as "parties in interest." *See* ERISA, § 2(14), 29 U.S.C. § 1002(14). The term "party in interest" is defined broadly and includes fiduciaries, plan employees, employers whose employees are covered by ERISA plans, service providers, employee organizations whose members are covered by a plan, and owners of fifty percent or more of stock in these employer and employee organizations. *See id.* Parties in interest also include employees, officers, and directors, as well as shareholders, partners, and joint venturers owning ten percent or more of entities that are themselves parties in interest. *See* ERISA, § 2(14)(H)-(I), 29 U.S.C. § 1002(14)(H)-(I). Section 406 of ERISA, 29 U.S.C. § 1106, prohibits fiduciaries from engaging in certain transactions with these parties in interest.

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ERISA provides a variety of means to enforce these provisions. Under section 502 of ERISA, 29 U.S.C. § 1132, plan participants, beneficiaries, fiduciaries, and the Secretary of Labor may bring civil actions to redress various violations of the statute. In this case, the Secretary asserted claims against Mr. Stangl pursuant to section 502(a)(5), which authorizes civil actions seeking "appropriate equitable relief" to redress violations of ERISA. ERISA, § 502(a)(5), 29 U.S.C. § 1132(a)(5).

In challenging the district court's dismissal of this action, the Secretary maintains that the plain language of the statute, its legislative history, ERISA's enforcement scheme, and persuasive case law allow the Secretary to bring an equitable action to recover the Plan's assets from a nonfiduciary party in interest. Mr. Stangl responds that the Supreme Court's decision in *Mertens* limits the causes of action the Secretary may bring to those that ERISA specifically lists and that ERISA does not provide an equitable action against a nonfiduciary party in interest for engaging in a prohibited transaction. In analyzing the issues presented, we begin with the statutory language. Then we discuss the impact of *Mertens*, ERISA's legislative history, and a related provision of the Internal Revenue Code.

A. Statutory Language

As noted above, section 502(a) provides that the Secretary may bring a civil action "(A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter." ERISA, § 502(a)(5), 29 U.S.C. § 1132(a)(5). Section 406(a), "a provision of this subchapter" to which section 502 applies, states that a fiduciary may not engage in certain transactions with a party in interest:

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Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect —

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

ERISA, § 406(a), 29 U.S.C. § 1106(a). Read together, sections 406 and 502 indicate that the Secretary's action against Mr. Stangl is an action under section 502 "for appropriate equitable relief" to redress a violation of section 406 and to enforce that section's prohibition of transactions with parties in interest.

Several other circuits have agreed with this interpretation, concluding that these sections authorize equitable actions against parties in interest who have engaged in prohibited transactions. In *Nieto v. Ecker*, 845 F.2d 868, 873-874 (9th Cir. 1988), the court addressed section 502(a)(3), which authorizes equitable actions by a participant, beneficiary, or fiduciary in language similar to the language used in section 502(a)(5) for actions brought by the Secretary.[3] In concluding that section 502(a)(3) authorizes equitable actions against parties in interest, the Ninth Circuit noted that section 502(a)(3)'s language expressly grants equitable power to redress violations of ERISA and that transactions prohibited under section 406 constitute violations for which equitable relief may be obtained. The Ninth Circuit reasoned that "[c]ourts may find it difficult or impossible to undo such illegal transactions unless they have jurisdiction over all parties who allegedly participated in them." *Nieto*, 845 F.2d at 874. The Ninth Circuit has recently reaffirmed this holding. *See Landwehr v. Dupree*, Nos. 93-36166, 94-35003, 1995 WL 733155, at *4-5 (9th Cir. Dec. 12, 1995); *Concha v. London*, 62 F.3d 1493, 1503-04 (9th Cir. 1995). The Third Circuit has reached the same conclusion. *See Reich v. Compton*, 57 F.3d 270, 285-87 (3d Cir. 1995).

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3. Section 502(a)(3) provides that civil actions may be brought

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

ERISA, § 502(a)(3), 29 U.S.C. § 1132(a)(3).

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The First Circuit's decision in *Reich v. Rowe*, 20 F.3d 25 (1st Cir. 1994), adopts the same interpretation of these ERISA provisions. In *Rowe*, the court held that ERISA did not authorize the Secretary to bring an equitable action against a nonfiduciary for participating in a breach of a fiduciary's duties. However, in reaching that conclusion, the court contrasted actions against nonfiduciaries alleging participation in a fiduciary's breach with actions against nonfiduciary parties in interest alleging participation in prohibited transactions. As to the latter, the court reasoned that transactions prohibited under section 406 constituted " 'acts or practices' . . . for which [section 502(a)(5), provides a remedy." *Id.* at 31. Importantly, the *Rowe* court found it insignificant that § 406 imposes the obligation on fiduciaries rather than parties in interest:

> The fact that [section 406] imposes the duty to refrain from prohibited transactions on fiduciaries and not on the parties in interest is irrelevant for our purposes because [section 502(a)(5), reaches "acts or practices" that violate ERISA and prohibited transactions violate [section 406]. Although fiduciary breaches also violate ERISA, nonfiduciaries cannot, by definition, engage in the act or practice of breaching a fiduciary duty. Nonfiduciaries, can, however, engage in the act or practice of transacting with an ERISA plan.

Id. at 31 n.7.

We agree with the analysis of *Nieto*, *Compton*, and *Rowe*. Like those courts, we conclude that the fact that section 406(a)

expressly imposes duties on fiduciaries rather than on parties in interest does not limit the Secretary's authority to file equitable actions against those parties in interest who have engaged in prohibited transactions. The transactions specified in section 406(a) necessarily involve two parties: the fiduciary and the party in interest. In the absence of an express limitation as to who may be named as a defendant in an equitable action filed by the Secretary, we read the statutory prohibition of certain kinds of transactions to offer some protection for ERISA plans from the misdeeds of both parties to the prohibited transaction. Importantly, the Supreme Court has noted that, in enacting section 406, "Congress' goal was to bar categorically a transaction that was likely to injure the pension plan." *Commissioner v. Keystone Consol. Indus., Inc.*, 113 S. Ct. 2006, 2012 (1993). Interpreting sections 406(a) and 502(a)(5) to allow the Secretary to bring an equitable action against a party in interest comports with that goal by providing a remedy for the injurious effects of prohibited transactions.

Additionally, we find it significant that the Secretary can bring an action to enjoin an ongoing breach of a fiduciary's duty to the plan. *See* ERISA, § 502(a)(5), 29 U.S.C. § 1132(a)(5) (authorizing civil actions "to enjoin any act or practice which violates any provision of this subchapter"). It would make little sense to grant the Secretary such broad enforcement powers to stop ongoing violations of ERISA and then to limit the Secretary's power to recover plan assets acquired through these same violations. Such an interpretation of section 502(a)(5) would effectively create a zone of immunity, protecting the illegitimate gains of parties in interest who have completed prohibited transactions that the Secretary could have enjoined while they were occurring. We therefore conclude that the language of sections 406(a) and 502(a)(5) allows the Secretary

to bring an equitable action against a party in interest who has engaged in a prohibited transaction.

B. Mertens

Notwithstanding the statutory language, Mr. Stangl argues that the Supreme Court's decision in *Mertens* forecloses the Secretary's action against him. In *Mertens*, the plaintiffs filed a claim against the actuary of their former employer's pension plan. The plaintiffs argued that the actuary's advice had caused the pension plan to be inadequately funded and sought equitable relief under section 502(a)(3) of ERISA. Both parties assumed that the plaintiffs had pled a legally sufficient cause of action, and the only issue before the Court was whether the plaintiffs truly sought equitable relief. The Supreme Court held that the plaintiffs had sought legal, not equitable, relief and that they could not recover legal damages from a nonfiduciary for knowingly participating in a fiduciary breach under section 502(a)(3) of ERISA. *Mertens*, 113 S. Ct. at 2066-2071.[4] However, in dicta, the *Mertens* Court also expressed doubt as to whether ERISA provides any cause of action against nonfiduciaries for participating in a fiduciary breach:

> [N]o provision explicitly requires [nonfiduciaries] to avoid participation (knowing or unknowing) in a fiduciary's breach of fiduciary duty. It is unlikely,

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4. Writing for four Justices in dissent, Justice White argued that Congress intended that ERISA provide more protection for employees and their beneficiaries than the common law provided, that the common law of trusts provided a cause of action in equity against nonfiduciaries for participating in a fiduciary breach, and that the language of ERISA did not compel the majority's conclusion. *Id.* at 2072-78 (White, J., dissenting).

> moreover, that this was an oversight, since ERISA *does* explicitly impose "knowing participation" liability on cofiduciaries. *See* § 405(a), 29 U.S.C. § 1105(a). That limitation appears all the more deliberate in light of the fact that "knowing participation" liability on the part of *both* cotrustees *and* third persons was well established under the common law of trusts. In *Russell*, we emphasized our unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted *and* detailed enforcement scheme provides "strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly."

Id. at 2067 (quoting *Russell*, 473 U.S. at 146-47) (citation omitted).

For several reasons, we do not read *Mertens* to preclude the Secretary's action against Mr. Stangl. Most importantly, in discussing the fact that ERISA does not expressly prohibit a nonfiduciary from participating in a fiduciary's breach of duty, the *Mertens* Court did not suggest a similar interpretation of the provisions regarding prohibited transactions with parties in interest. In fact, like the First Circuit in *Rowe*, the Court contrasted the lack of ERISA provisions regarding a nonfiduciary's participation in a fiduciary's breach with various ERISA provisions "that can be read as imposing obligations upon nonfiduciaries." *Id.* As an example of a provision that imposes such an obligation, the Court cited section 406(a)'s prohibition on parties in interest offering services or engaging in other transactions with the plan. *Id.* at 2067 n.4. The Court's

reference to these provisions indicates that its statements regarding the lack of statutory provisions addressing a nonfiduciary's participation in a fiduciary's breach should not be read to preclude claims concerning prohibited transactions under section 406.

Moreover, in reaching its conclusion regarding actions for money damages against nonfiduciaries, the *Mertens* Court discussed section 502(1)(1) of ERISA, 29 U.S.C. § 1132(1)(1), a provision added to ERISA in 1989. Section 502(1)(1) provides:

> In the case of —
>
> (A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary, or
>
> (B) any knowing participation in such a breach *or violation by any other person,*
>
> the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of *the applicable recovery amount.*

ERISA § 502(1)(1), 29 U.S.C. § 1132(1)(1) (emphasis added). The Supreme Court rejected the plaintiffs' argument that the reference to "the applicable recovery amount" established that legal damages could be recovered from a nonfiduciary participating in a fiduciary's breach. However, the Court noted that " 'equitable relief' awardable under § 502(a)(5) *includes restitution of illgotten plan assets or profits,* providing an 'applicable recovery amount' to use to calculate the penalty."

Mertens, 113 S. Ct. at 2071 (emphasis added). The Court's definition of appropriate equitable relief under section 502(a)(5) is surely broad enough to include the recovery of the fruits of a prohibited transaction from a party in interest.

Finally, the circuits that have discussed the issue after *Mertens* have not found that the Supreme Court's decision bars equitable actions seeking restitution from parties in interest. *See Concha*, 62 F.3d at 1503-04; *Compton*, 57 F.3d at 287; *Rowe*, 20 F.3d at 33. These decisions and the Supreme Court's discussion in *Mertens* establish that the Court has not foreclosed the Secretary's action against Mr. Stangl.

C. Legislative History

Through an examination of ERISA's legislative history, the district court concluded that, in spite of the broad authorization of "appropriate equitable relief" under section 502(a)(5), Congress did not intend to allow the Secretary to bring equitable actions against parties in interest engaging in prohibited transactions. The court relied primarily on the initial Senate version of ERISA, which stated that

> [a]ny party in interest who participates in a transaction prohibited by this Act knowingly, or with reason to know that the transaction was a transaction to which this Act applies, shall be personally liable to make good to the fund any losses sustained by the fund resulting from such transaction, and to pay to the fund any profits realized by him from such transaction.

S. 4, 93d Cong., 1st Sess., at 180 (1973).

The district court noted that this language regarding personal liability of parties in interest was not included in the final version of the statute and that, in the final version, Congress addressed the issue of prohibited transactions in section 406(a) by imposing the obligation to avoid these transactions on fiduciaries rather than on parties in interest. The adoption of the narrower language of section 406(a) signified to the district court that Congress had rejected the notion that parties in interest were proper defendants in Secretarial actions seeking equitable relief.[5]

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5. The House Conference Report explains the differences between the Senate and House versions of ERISA:

> Under the House bill, fiduciaries generally are prohibited from dealing on behalf of a plan with persons known to be parties-in-interest unless the dealings are for adequate consideration. Also, the bill generally prohibits fiduciaries from dealing with plan assets for their own accounts, receiving consideration from other parties dealing with the plan in a transaction involving the plan, or acting in a transaction involving the plan on behalf of a person who is adverse to the plan.
>
> Under the House bill, a fiduciary is to be personally liable for losses to the plan resulting from violations of the fiduciary responsibility rules.
>
> The Senate amendment includes rules governing fiduciary responsibility in both the labor and tax provisions. The labor provisions of the amendment, as in the case of the House bill, deal with the basic responsibility of fiduciaries, plan administrators, and

(Cont'd)

Appendix B

The Secretary responds by noting that the final version of ERISA did contain an enforcement provision significantly broader than the provision contained in the initial House version. In particular, the Secretary observes that the initial House version did not contain the broad authorization of civil actions seeking "other appropriate equitable relief" that was ultimately

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(Cont'd)

> structure; also and [sic] these provisions would establish certain transactions as prohibited transactions. Fiduciaries (and parties-in-interest) are to be personally liable under the labor provisions for losses sustained by a plan that result from a violation of these rules.

H.R. Rep. No. 1280, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5075. In addition, the House Conference Report explains that the fiduciary was the main focus of the prohibited transaction rules in the amended version of ERISA ultimately adopted by Congress:

> The conference substitute prohibits plan fiduciaries and parties-in-interest from engaging in a number of specific transactions. Prohibited transaction rules are included both in the labor and tax provisions of the substitute. Under the labor provisions (title I), the fiduciary is the main focus of the prohibited transaction rules. This corresponds to the traditional focus of trust law and of civil enforcement of fiduciary responsibilities through the courts. On the other hand, the tax provisions (title II) focus on the disqualified person. This corresponds to the present prohibited transaction provisions relating to private foundations.

Id. at 5087 (footnote omitted).

inserted into section 502(a)(5). See H.R. 2, 93d Cong., 1st Sess., at 150 (1973).[6]

The Secretary's response is persuasive. In light of the broad language that Congress did include in section 502(a)(5), the fact that no provision of ERISA (as ultimately enacted) expressly imposes "personal liability" on parties in interest (as the initial House version did) does not indicate that a party in interest can never be a proper defendant in an equitable action. Indeed, as we have noted, the Supreme Court has observed that "equitable relief" under section 502(a)(5) includes restitution of what parties in interest may obtain from engaging in prohibited transactions: "illgotten plan assets or profits." *Mertens,* 113 S. Ct. at 2071. Moreover, the legislative history of ERISA repeatedly states that the statute was enacted to protect plan beneficiaries' interests in plan assets. *See* S. Rep. No. 127, 93d

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6. The initial House version provided that

> Civil actions under this title may be brought —
>
> ...
>
> (2) by the Secretary or by a participant, beneficiary or fiduciary for appropriate equitable relief under section iii(d) (3) by the Secretary, or by a participant, beneficiary, or fiduciary to enioin any act or practice which violates any provision of this title.

H.R. 2, 93d Cong., 2d Sess., at 150. (1974).

Section iii(d) of the initial House version addressed a fiduciary's personal liability for breach of duty. *See id.* at 42.

Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4866-71 (1974); H. Rep. No. 533, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649-51 (1974). Given the language of section 502(a)(5) and the policy of protecting plan beneficiaries that underlies ERISA, we conclude that the legislative history does not preclude the Secretary's action against Mr. Stangl.

E. Parallel Tax Provisions

In challenging the district court's grant of summary judgment to Mr. Stangl, the Secretary also invokes certain provisions of ERISA that authorize the Secretary of the Treasury to assess taxes on persons participating in prohibited transactions. 26 U.S.C. § 4975(h) provides that, before assessing an excise tax on a party in interest, the Secretary of the Treasury must notify the Secretary of Labor and "provide him a reasonable opportunity to obtain a correction of the prohibited transaction or to comment on the imposition of such tax." As used in section 4975(h), " 'correction' . . . mean[s], with respect to a prohibited transaction, undoing the transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards." 26 U.S.C. § 4975(f)(5). The Secretary maintains that section 4975 (h)'s reference to his "correcting" a transaction indicates that he may seek equitable relief against a party in interest under section 502(a)(5).

Like the Third Circuit, we find this argument convincing. *See Compton,* 57 F.3d at 286 ("Since 'correction of the prohibited transaction' implies an order of restitution directed to the party who participated in the transaction with the plan, this provision buttresses the Secretary's position."). We therefore

conclude that section 4975 (h)'s recognition of the Secretary's authority to correct a prohibited transaction rebuts Mr. Stangl's contention that Congress did not intend to subject parties in interest to civil actions seeking equitable relief.

III. CONCLUSION

The language of sections 406(a) and 502(a)(5) of ERISA, the legislative history of ERISA, the decisions of other circuits, the Supreme Court's decision in *Mertens*, the policies underlying ERISA, and 26 U.S.C. § 4975(h) establish that the Secretary may bring a civil action for equitable relief under section 502(a)(5) against a party in interest who has engaged in a prohibited transaction. Accordingly, the decision of the district court granting summary judgment to Mr. Stangl is REVERSED and the case is REMANDED to the district court for proceedings consistent with this opinion.

Supreme Court, U.S.
FILED
JUN 24 1996
CLERK

No. 95-1631

In the Supreme Court of the United States

OCTOBER TERM, 1995

FRANZ C. STANGL, PETITIONER

v.

ROBERT B. REICH, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Section 502(a)(5) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(5), authorizes a cause of action by the Secretary of Labor for equitable relief against a party in interest who has engaged, with an employee benefit plan, in transactions prohibited by Section 406(a) of ERISA, 29 U.S.C. 1106(a).

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 26a-44a) is reported at 73 F.3d 1027. The decision and order of the district court (Pet. App. 1a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1996. The petition for a writ of certiorari was filed on April 9, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In June 1978, David R. Davidson, Jr. became a trustee of the Davidson Lumber Sales Inc. Employees Retirement Plan (the Plan), an employee pension

benefit plan. In addition, Davidson was a 50% limited partner in a business venture known as the S & D Limited Partnership (S & D). Petitioner held a 48% limited partnership interest and a two percent general partnership interest in S & D. Petitioner was also the sole general partner of another business venture, the Bowling Property Limited Partnership (Bowling), an entity formed to develop certain real estate in Sandy, Utah (the Sandy Property). On December 21, 1979, the Plan extended Bowling a $200,000 loan, evidenced by a promissory note and secured by a deed of trust on the Sandy Property. The note was renewed several times between 1979 and 1985, even though no payments had been made on it. Pet. App. 3a-4a, 27a-28a.

In 1985, petitioner entered into a series of agreements with Davidson, ostensibly for the purpose of reconciling their business relationship. Under the terms of one such agreement, Davidson personally assumed Bowling's obligations on the $200,000 loan and caused the Plan to reconvey to Bowling the deed of trust that had secured the loan. Pet. App. 4a, 28a.

2. In 1990, the Secretary of Labor filed suit against petitioner under Section 502(a)(5) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(5), in the United States District Court for the District of Utah. Pet. App. 4a, 28a.[1] The Secretary alleged: (i) that, by causing the Plan to engage in the Bowling loan transactions, Davidson had breached his fiduciary duties to the Plan under ERISA, and petitioner knowingly participated in

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[1] The Secretary also brought claims against Davidson, which were resolved by means of a consent decree entered on August 16, 1993. See Pet. 4; Pet. App. 2a & n.1, 28a.

those breaches, *id.* at 5a, 28a; and (ii) that petitioner was a party in interest to the Plan, within the meaning of Section 3(14) of ERISA, 29 U.S.C. 1002(14), and the Bowling loan transactions were therefore unlawful under Section 406(a) of ERISA, 29 U.S.C. 1106(a). Pet. App. 5a-8a, 28a. The Secretary sought equitable relief, including an order of restitution requiring petitioner to return to the Plan the unjust enrichment he received through the prohibited loan transactions, a constructive trust on petitioner's interest in the Sandy Property, and an order permanently enjoining petitioner from serving as an ERISA fiduciary. *Id.* at 4a-5a, 28a-29a & n.1.[2]

On cross-motions for summary judgment, the district court entered judgment for petitioner, having concluded that ERISA provides no cause of action against a nonfiduciary party in interest either for knowingly participating in a fiduciary breach or for engaging in a transaction prohibited by Section 406(a). Pet. App. 1a-25a. As to the former, the court relied heavily on a discussion in this Court's decision in *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248 (1993), which suggested (but expressly did not decide) that ERISA provides no cause of action for knowing participation in a fiduciary breach. Pet. App. 13a. See 508 U.S. at 253-255. The court found *Mertens* "less clear" with regard to the liability of nonfiduciary parties in interest for engaging in prohibited transactions, Pet. App. 17a, but concluded (primarily based on its impression of the legislative history) that Congress intended to impose liability for violations of

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[2] The Secretary also sought compensatory damages, but he withdrew that request following this Court's decision in *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248 (1993).

the prohibited transaction rules only on plan fiduciaries, *id.* at 18a-23a.

3. The court of appeals reversed the district court's judgment with regard to the prohibited transactions claim. Pet. App. 26a-44a.[3] Looking first to the statutory text, it concluded that the Secretary's suit was authorized under Section 502(a)(5) as an action "'for appropriate equitable relief' to redress a violation of section 406 and to enforce that section's prohibition of transactions with parties in interest." Pet. App. 31a-32a. Like the other courts of appeals that have ruled on the issue, it found that "the fact that section 406(a) expressly imposes duties on fiduciaries rather than on parties in interest does not limit the Secretary's authority to file equitable actions against those parties in interest who have engaged in prohibited transactions." Pet. App. 34a-35a; see also *id.* at 33a-34a (citing *Nieto* v. *Ecker*, 845 F.2d 868, 873-874 (9th Cir. 1988); *Landwehr* v. *DuPree*, 72 F.3d 726, 734 (9th Cir. 1995); *Concha* v. *London*, 62 F.3d 1493, 1503-1504 (9th Cir. 1995), cert. dismissed, 116 S. Ct. 1710 (1996); *Reich* v. *Compton*, 57 F.3d 270, 285-287 (3d Cir. 1995); *Reich* v. *Rowe*, 20 F.3d 25, 31 (1st Cir. 1994)).

The court of appeals observed that, in *Mertens*, this Court expressly contrasted the absence of any provision prohibiting a nonfiduciary from knowingly participating in a fiduciary's breach, with Section 406(a)'s explicit prohibition on parties in interest engaging in certain transactions. Pet. App. 37a (citing *Mertens*, 508 U.S. at 253-254). It reasoned therefrom that, whatever doubt this Court's

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[3] The Secretary did not appeal the district court's judgment with regard to the knowing participation claim.

statements might cast on actions against nonfiduciaries for knowing participation, *Mertens* "should not be read to preclude claims concerning prohibited transactions under section 406." Pet. App. 38a. It noted that the courts of appeals that have decided the issue have uniformly concluded that *Mertens* does not preclude "equitable actions seeking restitution from parties in interest." *Id.* at 39a, citing *Concha*, 62 F.3d at 1503-1504; *Compton*, 57 F.3d at 287; *Rowe*, 20 F.3d at 33.

Unlike the district court, the court of appeals did not view the legislative history as evincing any intent to preclude equitable actions against parties in interest. Pet. App. 41a-43a. Congress's rejection of a provision that would have explicitly imposed civil liability on parties in interest did not, in the court's view, demonstrate a congressional desire to immunize parties in interest from liability for violating the prohibited transaction rules, given Congress's express authorization in Section 502 of suits for "appropriate equitable relief" for any act or practice violative of Title I of ERISA. Pet. App. 42a.

Finally, the court of appeals found probative certain provisions in the Internal Revenue Code that authorize the Secretary of the Treasury to assess excise taxes on parties in interest who participate in prohibited transactions. Pet. App. 43a. In particular, the court noted (*ibid.*) the requirement in 26 U.S.C. 4975(h) that, before assessing such a tax on a party in interest who has engaged in a prohibited transaction, the Secretary of the Treasury must provide the Secretary of Labor with "a reasonable opportunity to obtain a correction." In the court's view, the Secretary of Labor's presumed ability to "correct[]" a prohibited transaction bolsters the Secretary's

authority under Section 502(a)(5) to seek orders of restitution against parties in interest. Pet. App. 43a.

ARGUMENT

Petitioner argues that the court of appeals erred in holding that Section 502(a)(5) of ERISA provides the Secretary of Labor with a cause of action for equitable relief against a nonfiduciary party in interest who has engaged in transactions prohibited by Section 406. Contrary to petitioner's argument, the court of appeals' holding is correct. It is, moreover, consistent with the conclusion of every other court of appeals that has ruled on the matter, and with this Court's discussion in *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248 (1993). No further review is warranted.

1. The court of appeals' conclusion that the Secretary may sue a nonfiduciary party in interest for violating ERISA's prohibited transaction rules follows directly from the relevant statutory text. Section 502(a)(5) of ERISA states that the Secretary of Labor may bring a civil action "to enjoin any act or practice" that violates the requirements set forth in Title I of the Act, or "to obtain other appropriate equitable relief * * * to redress such violation." The term "redress" means "the setting right of what is wrong," *The Random House Dictionary of The English Language* 1617 (2d ed. 1987); *Webster's Third New International Dictionary* 1904 (1986), and the equitable relief "appropriate" to obtain such redress "includes restitution of ill-gotten plan assets or profits," *Mertens*, 508 U.S. at 260.

Section 406(a) of ERISA, 29 U.S.C. 1106(a), is a provision within Title I of the Act. It prohibits a plan fiduciary from causing a plan to engage in certain enumerated transactions with (or benefitting) related

parties, referred to under ERISA as "part[ies] in interest."[4] Among other things, it prohibits loans and other extensions of credit between a plan and a party in interest, as well as the transfer of plan assets to, or use of such assets by or for the benefit of, a party in interest.[5] In making such transactions illegal per se, "Congress' goal was to bar categorically a transaction that was likely to injure the pension plan." *Commissioner* v. *Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160 (1993).[6]

As the court of appeals observed, "the Secretary's action against [petitioner] is an action under section

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[4] "Part[ies] in interest" is defined broadly to include plan fiduciaries, plan employees, employers whose employees are covered by a plan, service providers, employee organizations whose employees are covered by a plan, owners of at least 50% or more of stock in those employers, employee organizations, and certain relatives of parties in interest, as well as officers, shareholders and directors of entities that are themselves parties in interest, and owners of ten percent or more of such entities. 29 U.S.C. 1002(14).

[5] Section 406(a) provides in relevant part:

> (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect —
>
> > (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
> >
> > (B) lending of money or other extension of credit between the plan and a party in interest; [or]
> >
> > * * * * *
> >
> > (D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan[.]

[6] Section 408 of ERISA, 29 U.S.C. 1108, exempts certain transactions from ERISA's prohibited transaction provisions, but those exemptions are not relevant here.

502 'for appropriate equitable relief' to redress a violation of section 406 and to enforce that section's prohibition of transactions with parties in interest." Pet. App. 32a. Although Section 406(a) imposes the duty to avoid prohibited transactions on the fiduciary, rather than the party in interest, since the "act or practice" of engaging in a prohibited transaction by definition involves both the fiduciary and the party in interest (who may or may not be a fiduciary), Section 502(a)(5) encompasses actions for equitable relief against nonfiduciary parties in interest.[7]

That conclusion is supported by the parallel tax treatment of prohibited transactions in Title II of ERISA. The Internal Revenue Code requires that, before assessing an excise tax on a party in interest who has engaged in a prohibited transaction, the Secretary of the Treasury must provide the Secretary of Labor with an opportunity to obtain a "correction." 26 U.S.C. 4975(h). The term "correction" is defined as "undoing the transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards." 26 U.S.C. 4975(f)(5). The clear implication of those provisions is that the Secretary of Labor has the authority to seek equitable relief against a party in interest when such relief is necessary to "correct[]" the prohibited

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[7] Even if the statutory language were amenable to differing interpretations, considering that "[c]ourts may find it difficult or impossible to undo such illegal transactions unless they have jurisdiction over all parties who allegedly participated in them," *Nieto*, 845 F.2d at 874, it is hard to conceive of "any ERISA-related purpose that denial of a remedy would serve." *Varity Corp.* v. *Howe*, 116 S. Ct. 1065, 1079 (1996).

transaction. Petitioner's suggestion (Pet. 14-15) that ERISA establishes airtight jurisdictional divisions between the enforcement authority of the Secretary of Labor (over fiduciary acts) and that of the Secretary of the Treasury (over parties in interest) ignores the overlapping and complementary nature of their roles in this context.[8]

2. Contrary to petitioner's contention (Pet. 11-16), the legislative history of ERISA does not demonstrate a congressional intent to foreclose equitable actions against parties in interest. To be sure, Sections 409(a) and 502(a)(2) of ERISA, 29 U.S.C. 1109(a) and 1132(a)(2), which make fiduciaries susceptible to compensatory damages *and* equitable remedies, do not provide for party-in-interest liability for losses caused by a prohibited transaction, as did the pertinent Senate bill. H.R. 2, 93d Cong., 2d Sess. 533 (1974), *reprinted in* Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974*, at 3780 (Comm. Print 1976). But while that may indicate that "the fiduciary is the main focus of the prohibited transaction rules" under Title I of ERISA, H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 306 (1974), it does not suggest that redress, limited to "appropriate equitable relief," may not be obtained under Section 502(a)(5) against nonfiduciary parties in interest. As this Court explained in *Varity Corp.* v. *Howe*, 116 S.

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[8] See *McDougall* v. *Donovan*, 539 F. Supp. 596, 599 (N.D. Ill. 1982) ("Congress envisioned overlapping authority between the Department of Labor and the Internal Revenue Service in the administration and enforcement of pension plan standards under ERISA.").

Ct. 1065, 1078 (1996), Section 502(a)(5) is a "'catchall' provision[] [that] act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." Cf. 116 S. Ct. at 1077-1078 (holding that Section 502(a)(3) authorizes an individual cause of action for breaches of fiduciary duties that injure individual participants and beneficiaries, notwithstanding the absence of any provision for an individual cause of action under Sections 502(a)(2) and 409(a).[9]

3. Given the textual and structural support for the court of appeals' holding, there is no basis for petitioner's assertion that the court impermissibly "*inferred*" a cause of action against nonfiduciary parties in interest. Pet. 6; see also Pet. App. 8-10 (citing *Mertens*, 508 U.S. at 254-255 & n.5, and *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 146-147 (1985)). Indeed, contrary to petitioner's suggestion, this Court's discussion in *Mertens* respecting inferred causes of action supports the decision below. While the Court expressed doubt that ERISA provides a cause of action against a nonfiduciary for participating in a fiduciary breach (in the absence of any express duty on the part of a nonfiduciary to refrain from such participation), it contrasted the Act's silence on that issue with provisions of the Act, such as Section 406(a), that "can be read as imposing obligations upon nonfiduciaries." See 508 U.S. at 253-254 & n.4. Indeed, the Court specifically observed that "[p]rofessional service providers," like the respondents in *Mertens*,

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[9] Because of the parallel language in the two provisions, Section 502(a)(3) is properly construed in the same manner as Section 502(a)(5) in this regard. See *Mertens*, 508 U.S. at 260.

"must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by § 406." *Id.* at 262; see *Lockheed Corp.* v. *Spink*, No. 95-809 (June 10, 1996), slip op. 6 n.3.

4. Finally, as the court of appeals observed (Pet. App. 33a-34a, 39a), its resolution of this case was consistent with the decision of every court of appeals that has considered the issue. See *Compton*, 57 F.3d at 285-287 (ERISA authorizes action for equitable relief against nonfiduciary parties in interest who engage in prohibited transactions); accord *Rowe*, 20 F.3d at 33; *Nieto*, 845 F.2d at 873-874.[10]

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[10] The Ninth Circuit recently rejected the suggestion that *Nieto* has been overruled by *Mertens*:

> It is one thing to suggest, as does *Mertens*, that a nonfiduciary may not be held liable for participating in another's breach of fiduciary duty. It is quite another to say that a nonfiduciary may not be held liable for his own wrongful conduct—specifically, for engaging in a prohibited transaction * * * . Indeed, *Mertens* expressly states that nonfiduciary service providers "must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by [29 U.S.C. § 1106]." *Id.* [508] U.S. at [262].

Landwehr, 72 F.3d at 734; accord *Compton*, 57 F.3d at 285 ("*Mertens* itself seemed to imply that section 406(a) imposes duties on nonfiduciaries who participate in prohibited transactions.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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